83-2079

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

1983-84 TERM

BETTE RUTH S. FERGUSON,

PETITIONER-PLAINTIFF

VS.

HARRY N. WALTERS, Administrator of Veterans Affairs (succeeding ROBERT P. NIMMO, his predecessor in office),

RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION OF BETTE RUTH S. FERGUSON FOR WRIT OF CERTIORARI

SUBMITTED BY:

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98PP

QUESTION PRESENTED FOR REVIEW

1. WHETHER A FEMALE FEDERAL EMPLOYEE IS ENTITLED TO INJUNCTIVE RELIEF REQUIRING A FEDERAL AGENCY TO FOLLOW ITS STATUTORILY-MANDATED AFFIRMATIVE ACTION REGULATIONS PROMULGATED PURSUANT TO 42 U.S.C. §2000e-16, WHEN THE AGENCY'S FAILURE AND REFUSAL TO FOLLOW SUCH PLAN HAS RESULTED IN A REFUSAL TO PROMOTE THE EMPLOYEE.

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

BETTE RUTH S. FERGUSON, — APPELLANT

HARRY N. WALTERS, Administrator of Veterans Affairs (succeeding ROBERT P. NIMMO, his predecessor in office),[1] — APPELLEE

1. The opinion of the Court of Appeals for the Eleventh Circuit (Ferguson v. Veterans Administration, 723 F.2d 871 [11th Cir. 1984], lists the "Defendant-Appellee" as the "Veterans Administration," although Section 717(c) of Title VII (42 U.S.C. §2000e-16[c]) provides that "the head of the department, agency, or unit, as appropriate, shall be the defendant in civil actions under Title VII involving federal employment matters. See Canino v. United States E.E.O.C., 707 F.2d 468, 472 (11th Cir. 1983).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES CITED — PAGE

CASES CITED PAGE

CASES CITED PAGE

CASES CITED PAGE

OTHER AUTHORITIES

OTHER AUTHORITIES PAGE

REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgment in Ferguson v. Veterans Administration, 723 F.2d 871 (11th Cir. 1984), after the trial court granted summary judgment in favor of the Defendant. See A1.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 27, 1984. A petition for rehearing and a suggestion for en banc consideration was denied by the United States Court of Appeals for the Eleventh Circuit on March 19, 1984. A22.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The relevant statutory and regulatory provisions are set out in the appendix hereto as follows:

STATEMENT OF THE CASE

This action was filed under 42 U.S.C. §§2000e-5(f) and 2000e-16(c) (Title VII of the Equal Employment Opportunity Act) against the Administrator of Veterans Affairs alleging discrimination against the Plaintiff in federal employment because of her sex. (See Complaint, R. 1-8).[2]

The Plaintiff alleged that she was denied the position of Librarian at Tuscaloosa V.A. Medical Center because of the total failure of officials at that station to implement its affirmative action plan required by 42 U.S.C. §2000e-16(b), by Ex-

2. Necessary Title VII administrative remedies were appropriately exhausted. The complaint also sought declaratory relief under 28 U.S.C. §2201 et seq. and judicial review under 5 U.S.C. §701 et seq. (R. 5-6), but because of the exclusivity of relief under Title VII in discrimination in federal employment claims announced in Brown v. G.S.A., 425 U.S. 820, 48 L.Ed 2d 402, 96 S.Ct. 1961 (1976), those claims would not need to be addressed unless no relief is available under Title VII.

ecutive Order No. 11478, by 29 C.F.R., Part 1613 (formerly 5 C.F.R., Part 713), and by the Veterans Administration's own regulations contained in Veterans Administration Manual, Part I, Chapter 713. (R. 4-5).

The trial court granted the Defendant's motion for summary judgment (R. 1043-47), first holding that a violation of a statutorily-mandated affirmative action plan by a federal agency did not automatically violate Title VII itself. Second, the trial court alluded to the disparate treatment prima facie case standards of McDonell Douglas Corporation v. Green, 411 U.S. 792, 36 L.Ed 2d 668, 93 S.Ct. 1817 (1973), and observed that the Plaintiff was not qualified for the position which she sought, and that the selectee was qualified and was also a female.

Upon appeal (Ferguson v. Veterans Administration, 723 F.2d 871 [11th Cir.

1984]), the panel affirmed the district court's judgment, and a panel rehearing, as well as a rehearing en banc, was denied.

At the time of the enactment of the Equal Employment Opportunity Act of 1972, aimed at eradicating discrimination in federal employment, the Congress found "entrenched discrimination in the Federal service" and a disproportionate distribution of "women throughout the federal bureaucracy and their exclusion from higher level policy making and supervisory positions . . . ." Morton v. Mancari, 417 U.S. 535, 547, 41 L.Ed 2d 290, 298, 94 S.Ct. 2474, n. 22 (1974) (quoting from HR Rep. No. 92-238, on HR 1746, pp. 23-24 [1971]).[3]

3. The clear purpose of the Equal Employment Opportunity Act of 1972, prohibiting discrimination in federal employment, was to "correct this entrenched discrimination in the Federal

When the Congress acted to eradicate entrenched discrimination in federal employment in 1972, it did not stop with a simple admonition to refrain from discriminating, but rather it required each covered agency to submit plans, both national and regional, "in order to maintain an affirmative program of equal employment opportunity for all [its] employees ....," and required the plan to contain "provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest

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service . . . [by insuring] the effective application of uniform, fair and strongly enforced policies." Morton v. Mancari, 417 U.S. 535, 547, 41 L.Ed 2d 290, 299, 94 S.Ct. 2474 (1974) (quoting from HR Rep. No. 92-238, on HR 1746, pp. 24-25 [1971]; Chandler v. Roudebush, 425 U.S. 840, 841, 48 L.Ed 2d 416, 420, 96 S. Ct. 1949 (1976). The Court in Morton also observed that "the mechanism for enforcing long standing Executive Orders forbidding Government discrimination [had] proved ineffective for the most part," and that the 1972 Act was enacted "[i]n order to remedy this . . . ." 417 U.S. at 546-47, 41 L.Ed 2d at 298.

potential." 42 U.S.C. §2000e-16(b). (Emphasis added). The V.A. sought to comply with the statute by adopting rigorous affirmative action plans.[4]

Although the Plaintiff served at the Tuscaloosa facility for six years before a vacancy occurred in the position of Librarian in 1980, and although V.A. officials there were well aware of her prior federal service as Librarian and of her interest in again serving in that posi-

4. The various national rules, policies, regulations and plans applicable to the V.A. and the Tuscaloosa facility's own "regional" plans, all adopted in compliance with the specific mandate of the Congress (R. 1013), committed to "aggressively seek out qualified employees who . . . have potential for development," to "identify employees with under- or non-utilized skills and facilitate their movement into positions in keeping with their abilities and skills," to "review individual attainments and potential of present employees to determine [the] extent to which they may have been under-utilized," and to provide qualifications counseling to an employee who "expresses interest [in a position] but is not qualified." (R. 530, 587-88, 618, 662, 669, 685, 778, 788-89, 797, 989).

tion, they did not take steps to implement or effect the affirmative action plan at the Tuscaloosa facility as it related to the Plaintiff. (R. 1012-14). Thus, the Plaintiff did not know and was not apprised that the V.A. qualifications for Librarian were different from those of the other federal agency with which she had worked. (R. 1012-13).

After learning of the special V.A. qualifications to serve as Librarian, the Plaintiff went back to school and secured the requisite qualifications. (R. 1016).

The evidence in this case shows that Tuscaloosa V.A. Medical Center has done a woefully sad job of eradicating sex preferences in employment there.[5]

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5. In 1973, it had 104 employees at the GS-7 level or above, and only 28, or 26,9%, were women. (R. 462). By the time the station prepared its annual report for FY 1979, it had 140 employees at the GS-7 level or above, and only 36, or 25.7%, were women. (R. 768). The

ARGUMENT

(A) Relief Under Title VII.

Given the general applicability of the well-recognized rule that a federal agency is required to adhere to its own regulations (Board of Curators v. Horowitz, 435 U.S. 78, 92, 55 L.Ed 2d 124, 136, 98 S.Ct. 948 [1978]; Morton v. Ruiz, 415 U.S. 199, 235, 39 L.Ed 2d 270, 294, 94 S.Ct. 1055 [1974]; Service v. Dulles, 354 U.S. 363, 388, 1 L.Ed 2d 1403, 1418, 77 S.Ct. 1152 [1957]; Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed 681, 74 S.Ct. 499

1973 report further showed that there were 56 employees at the Tuscaloosa facility at the GS-10 level or above, and that only 15, or 26.8%, were female. (R. 462). The 1979 report showed that the number of employees at the GS-10 level or above had risen to 72, but that the total number of women holding those positions had dropped to 10, meaning that females then occupied only 13.9% of those top-level positions. (R. 768).

[1954]; Hall v. Schweiker, 660 F.2d 116, 119 [5th Cir. 1981]), coupled with the congressional mandate that federal agencies adopt regulations to eradicate entrenched discrimination and make race irrelevant in federal employment (42 U.S.C. §2000e-16[b]; Morton v. Mancari, 417 U.S. 535, 547, 41 L.Ed 2d 290, 298-99, 94 S.Ct. 2474 [1974]; Chandler v. Roudebush, 425 U.S. 840, 841, 48 L.Ed 2d 416, 420, 96 S.Ct. 1949 [1976]), it would logically follow that an affected employee could, through litigation under Title VII, require his or her agency to abide by the rules it was required to adopt.[6]

6. This is particularly true since the statutory relief provided for in Title VII (42 U.S.C. §2000e-5[g]) is expressly extensive, and the fact that Title VII has been declared the exclusive form of relief available to a federal employee charging discriminatory employment practices. See Brown v. G.S.A., 425 U.S. 820, 829-33, 48 L.Ed 2d 402, 409-11, 96 S.Ct. 1961 (1976).

The Eleventh Circuit decision in this case begins by adopting the law as stated in the majority decision in Page v. Bolger, 645 F.2d 227 (4th Cir.) (en banc), cert. denied, 454 U.S. 892, 70 L.Ed 2d 206, 102 S.Ct. 388 (1981), and by holding that "the defendant's failure to follow its affirmative action program does not violate Title VII . . . ." Ferguson v. Veterans Administration, 723 F.2d 871, 872 (11th Cir. 1984).

The Eleventh Circuit next searched for "discrimination" in this case, either under the disparate treatment or disparate impact theories.

As to disparate treatement, the Eleventh Circuit observed that "[t]he undisputed evidence shows that plaintiff did not meet the specified educational qualifications for the position of Librarian," and concluded that a disparate treatment

prima facie case is therefore not made. 723 F.2d at 873. However, the Plaintiff's antistrophic response is that she was not qualified because the Tuscaloosa V.A. Medical Center's policies and practices did not appropriately emphasize the special qualifications as required by statute and regulation. If this case is viewed as one of disparate treatment, it is submitted that the Plaintiff's qualifications should be irrelevant until the legitimacy of the Defendant's skill utilization policies under Title VII is established.[7]

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7. A similar problem was presented in Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982), where the plaintiff was challenging the selection system itself, and the employer, the Army Corps of Engineers, responded that he was not qualified. At 694 F.2d 1148, the Ninth Circuit said:

> "Wang is challenging the legitimacy of the selection system itself. He cannot be required to prove that he qualified for promotion under a system he alleges to be discriminatory unless the legiti-

As to disparate impact, the Eleventh Circuit has held that the Plaintiff failed to prove her case because there is no evidence that the position requirements or selection process for the position of Librarian impacted adversely upon women, or that the affirmative action program was

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macy of that system is first established."

The Eleventh Circuit also opined that "[t]he fact that it was a female who did meet the requisite qualifications, and who was ultimately hired for the job, militates against an assertion of sex-based discrimination on the part of the defendant." 723 F.2d at 873. One fact not noted by the Court of Appeals is that the selectee, while a female, came to the position from employment other than at Tuscaloosa V.A. Medical Center. (R. 1015-16). The Plaintiff insists that the V.A. installation cannot lawfully refuse to fairly treat its female employees who are on that station and justify such action by hiring a female from off the station. This is true because Title VII protects subclasses of women. (Harper v. Thiokol Chemical Corp., 619 F.2d 489, 492 [5th Cir. 1980]), and because an agency should not be allowed to hire someone from off its station as a pretextual device to cover up for discrimination against its own present employees. See Jones v. Western Geophysical Company, 669 F.2d 280 (5th Cir. 1982).

executed in a discriminatory manner. 723 F.2d at 873.[8] This case, however, asks the question whether adherence to pre-Act practices, which were admittedly discriminatory, and a refusal to change them, justifies relief under Title VII.

Under the disparate impact cases, an employment practice which has a significantly discriminatory impact (Pullman-Standard v. Swint, 456 U.S. 273, 276, 72 L.Ed 2d 66, 72, 102 S.Ct. 1781 [1982]) will result in a finding of discrimination under Title VII unless the employer can demonstrate that the practice has a manifest relationship to the employment in question. See Connecticut v. Teal, 457

8. A fact also not noted by the Eleventh Circuit decision is that the Plaintiff asserts much more than that "the affirmative action program was executed in a discriminatory manner." Rather, the undisputed evidence in this case shows that the affirmative action program was virtually ignored at the Tuscaloosa facility.

U.S. 440, 446, 73 L.Ed 2d 130, 137, 102 S.Ct. 2525 (1982). Here, despite the abundance of rules requiring the affirmative seeking out and development of employee skills, Tuscaloosa V.A. Medical Center has simply adhered to its pre-Title VII policies of allowing employees to fend for themselves in seeking promotional opportunities. (R. 984-97; 1013-14). This practice has been congressionally determined to have resulted in "entrenched discrimination." Morton v. Mancari, 417 U.S. 535, 547, 41 L.Ed 2d 290, 298-99, 94 S.Ct. 2474 (1974). The V.A. has not advanced any reason why it was necessary, or even advisable, to adhere to its pre-Act policies rather than to follow its congressionally- mandated rules. Certainly, adherence to its pre-Act policies has resulted in the further exclusion of females from upper level jobs at Tuscaloosa V.A.

Medical Center. (R. 462, 768).[9] In cases where an employer engages in an ongoing discriminatory practice, prospective injunctive relief halting the practice is declared to be mandatory. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L.Ed 2d 396, 97 S.Ct. 1843 (1977); N.A.A.C.P. v. City of Evergreen, Alabama, 693 F.2d 1367, 1370 (11th Cir. 1982).[10]

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9. Adherence to old policy and non-compliance with affirmative action requirements at Tuscaloosa V.A. Medical Center was forcefully recognized in Jones v. Cleland, 466 F.Supp. 34 (N.D. Ala. 1978), aff'd., 619 F.2d 82 (5th Cir. 1980).

10. Additionally, since the Defendant has offered no reason for continuing its discriminatory pre-Act policies, the presumption arises that the employment action thereunder was the product of a discriminatory intent, and the Plaintiff is entitled to her promotion and back pay unless the Defendant can show that the Plaintiff would not have been promoted even in the absence of that discriminatory intent. Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983); Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983).

When addressing the statutorily-mandated affirmative action requirements of 42 U.S.C. §2000e-16, sometimes there is confusion between those provisions and other references to "affirmative action." Sometimes "affirmative action" involves granting preferential treatment to minorities in order to correct past discriminatory practices. However, preferential treatment is specifically forbidden in the affirmative action requirements of §2000e-16.[11] It is conceded that Title VII, even in federal employment, does not require, but rather rejects, any form of preferential treatment. The best statement found by the Plaintiff on this point is in Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed 2d 158, 167, 91 S.Ct. 849

11. It should be noted that Title VII contains no statutory mandate that nonfederal employers adopt affirmative action plans.

(1970), where, in a private employment case, the Court said:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."

In the case of federal employment, Congress has placed a responsibility on each government agency to affirmatively seek and find the skills, potential skills, and interests for positions wherever they might be, so that everyone will have the same opportunity for developing his skills and interests to the end that he can progress in his employment. The affirmative action requirements envision the seeking out and finding of underutilized skills and potentials in males, females, blacks,

whites, foreign-born, native-born, Protestants, Jews, Catholics, etc., and treating them all alike. Only when that is done will "race, nationality, religion, and sex [truly] become irrelevant." The past practice of letting all persons in federal employment fend for themselves and allowing the ones who perhaps presented their own cases best to be favored in employment has been the culprit that caused the "entrenched discrimination in Federal service" condemned by the Congress and by the Supreme Court in Morton v. Mancari, 417 U.S. 535, 41 L.Ed 2d 290, 94 S.Ct. 2474 (1974), and Chandler v. Roudebush, 425 U.S. 840, 48 L.Ed 2d 416, 96 S.Ct. 1949 (1976). This practice, of allowing each person to fend for himself, was adhered to by Tuscaloosa V.A. Medical Center during all of its experience under Title

VII.[12] Insofar as the promotion of females to higher level positions is concerned, the practice has actually further entrenched discrimination against them at Tuscaloosa since 1973,[13] and has done nothing to eradicate actual discrimination at that facility. In Griggs v. Duke Power Co., supra, 401 U.S. at 429, 28 L.Ed 2d at 163, the Court said:

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in

12. For example, see R. 984-997, which is the Tuscaloosa V.A.'s "merit promotion plan." It is facially neutral and does not appear to be discriminatory. Likewise, the policy of not discussing specific qualifications for advancement with employees until a vacancy occurs or an employee inquires about them is also facially neutral. (See Agreed Facts A.15, 21; R. 1013, 1014). However, there is nothing in either policy which suggests the aggressive seeking of skills and potentials of all employees which the affirmative action requirements command and which would truly make the prohibited factors irrelevant.

13. See ante, pp. 8-9, n. 5.

> terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

The undisputed evidence in this case shows that the V.A. did not follow the mandates of Congress, the regulations of the Equal Employment Opportunity Commission,[14] the national rules of the V.A., nor its own affirmative action plan. In fact, the evidence in this case does not reveal that the V.A. has done anything at all to significantly enforce its affirmative action requirements since its compliance efforts were found to be totally lacking in Jones v. Cleland, 466 F.Supp. 34 (N.D. Ala. 1978), aff'd., 619 F.2d 82 (5th Cir. 1980); Jones v. Cleland, 515 F.Supp. 212 (N.D. Ala. 1981).

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14. E.E.O.C. is the successor to the Civil Service Commission as the enforcing agency for 42 U.S.C. §2000e-16.

Thus, Tuscaloosa V.A. Medical Center is not accused of refusing to grant preferential treatment to females in this case. Rather, it is accused of refusing to obey a statutory mandate to enforce rules making employment practices fair to all employees regardless of sex, race, religion, or national origin.

(B) Relief Outside Title VII.

Although the Plaintiff alternatively sought relief under 5 U.S.C. §701 et seq. and declaratory relief under 28 U.S.C. §2201, positing jurisdiction under 28 U.S.C. §1331(a) (R. 1-2, 5-6), she did so well aware that Brown v. G.S.A., 425 U.S. 820, 48 L.Ed 2d 402, 96 S.Ct. 1961 (1976), had relegated federal employee discrimination suits to Title VII as the exclusive form of relief. The Defendant argued in brief that the Plaintiff's claim must

"stand or fall on the Title VII law." (Appellee's Brief, p. 14). The Court of Appeals' decision suggested that a breach of contract action alleging that the affirmative action plan was a part of the Plaintiff's employment contract might lie, but the Eleventh Circuit did not address the Plaintiff's alternate claims under 5 U.S.C. §701 et seq. and 28 U.S.C. §2201, nor did it address the exclusionary rule laid down in Brown v. G.S.A., supra.[15]

CONCLUSION

For the courts to hold that one in the position of the Plaintiff has no

15. Similarly, the Fourth Circuit Court of Appeals in Page v. Bolger, 645 F.2d 227, 232, n. 10 (4th Cir. 1981), adopted as the law of the Eleventh Circuit in the panel decision, alluded to possible "other means by which" the plaintiff might have redressed a violation of Title VII regulations, without addressing the Brown principle.

available relief is unthinkable. 42 U.S.C. §2000e5(g) (made applicable in cases of federal employment by 42 U.S.C. §2000e-16[d]), begins by providing:

> "If the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice, charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice . . . ."

When a specific statutory scheme for review is provided, it has long been held that such scheme must be adhered to, "notwithstanding the absence of an express statutory command of exclusiveness." Whitney Nat. Bank v. Bank of New Orleans, 379 U.S. 411, 422, 13 L.Ed 2d 386, 395, 85 S.Ct. 551 (1965). In cases such as the one at bar, this Court has admonished that Title VII provides the exclusive remedy for a federal employee agrieved by actions

relating to matters of sex discrimination and are within the ambit of Title VII's purpose. Brown v. G.S.A., 425 U.S. 820, 48 L.Ed 2d 402, 96 S.Ct. 1961 (1976). The exclusivity was deemed mandated because of the "careful blend of administrative and judicial enforcement powers" contained in the 1972 amendments to the Equal Employment Opportunity Act extending the Act's provisions to federal employment. Brown, supra, 425 U.S. at 829, 48 L.Ed 2d at 409.

That Congress intended to permit the review of cases such as this under Title VII is almost a certainty. Even if such were not the case, however, this Court has held that judicial review of agency decisions is available in the district courts "in the absence of strong indications that a statute commits a decision irrevocably to agency discretion." Bell v. New Jersey, _____ U.S. _____, 76 L.Ed 2d 312, 327, 103 S.Ct. 2187 (1983).

When Congress found that the pre-Act practice caused "entrenched discrimination," and mandated a change in those practices, the covered federal agencies were bound to comply. The decision of the Eleventh Circuit Court of Appeals in this case, in essence holding that the Veterans Administration cannot be judicially required to obey the statute and follow the regulations, is in conflict with the decisions of this Court in Morton v. Ruiz, 415 U.S. 199, 235, 39 L.Ed 2d 270, 294, 94 S.Ct. 1055 (1974), Service v. Dulles, 354 U.S. 363, 388, 1 L.Ed 2d 1403, 1418, 77 S.Ct. 1152 (1957), and Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed 681, 74 S.Ct. 497 (1954). Each of those cases recognize that, as a matter of federal law, federal agencies are bound to follow the statutes governing their actions and the regulations promulgated thereunder.

The Eleventh Circuit decision is also in conflict with this Court's pronouncements in Whitney Nat. Bank v. Bank of New Orleans, 379 U.S. 411, 13 L.Ed 2d 386, 85 S.Ct. 551 (1965), and Brown v. G.S.A., 425 U.S. 820, 48 L.Ed 2d 402, 96 S.Ct. 1961 (1976), when read in light of Bell v. New Jersey, _____ U.S. _____, 76 L.Ed 2d 312, 103 S.Ct. 2187 (1983). Those cases collectively hold that judicial review of agency decisions is available absent strong indications to the contrary, and that such review should be permitted through the statutory review scheme provided.

Therefore, this Honorable Court should issue its writ of certiorari in this case because the decision of the Eleventh Circuit Court of Appeals is in conflict with applicable decisions of this Court. Rule 17.1(c), Rules of the Supreme Court. If that ground is not deemed ap-

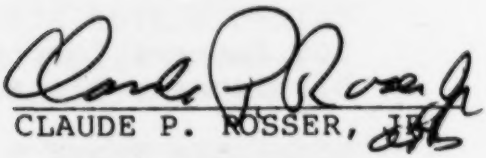
propriate, then certiorari should issue because the precise important issue of federal law has not been, but should be, settled by this Court. Rule 17.1(c), Rules of the Supreme Court.

The Plaintiff here has thought, and submits, that forcing one outside of the Title VII structure to seek relief for the violation of regulations mandated by Title VII itself and promulgated under the authority of Title VII actually is not logical, considering the wide range of relief authorized by 42 U.S.C. §2000e-5(g), and considering the Supreme Court's decision to funnel all federal employment discrimination suits through the Title VII machinery. However, before the doors of the courts are closed to the federal employee seeking to enforce affirmative action requirements, all the alternative approaches should be explored.

It is respectfully submitted that this Court should carefully analyze this case before allowing it to stand as precedent that an affected federal employee cannot secure judicial relief to require an agency to follow congressionally-mandated rules under Title VII aimed at eradicating discrimination in federal employment.

Respectfully submitted,

ALVIN T. PRESTWOOD



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* * * * * * * * * * * * *

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Frank W. Donaldson, United States Attorney, and Honorable Frank S. James, III, Assistant United States Attorney, Attorneys for the Defendant-Respondent by placing said copies in the United States Mail, first-class postage prepaid, being properly addressed to their respective business addresses as follows:

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Honorable Frank S. James, III
Assistant United States Attorney
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Birmingham, Alabama 35203

This the 16 day of JUNE, 1984.

ALVIN T. PRESTWOOD

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

1983-84 TERM

BETTE RUTH S. FERGUSON,

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ON WRIT OF CERTIORARI TO
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

TABLE OF CONTENTS

PAGE

Bette Ruth S. FERGUSON,
Plaintiff-Appellant

v.

VETERANS ADMINISTRATION,
Defendant-Appellee.

No. 82-7389.

United States Court of Appeals,
Eleventh Circuit.

Jan. 27, 1984.

Before GODBOLD, Chief Judge, RONEY and SMITH*, Circuit Judges.

RONEY, Circuit Judge:

Plaintiff Bette Ruth S. Ferguson, a white female, appeals the district court's grant of summary judgment for the defendant in this employment discrimination action. Plaintiff contends that her employer's failure to train and to hire her for the position of Librarian violated

* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Title VII, 42 U.S.C.S. §§ 2000e-5(f)(3), 2000e-16(c). Deciding that there was no evidence of discrimination and that the defendant's failure to follow its affirmative action program does not violate Title VII, we affirm.

Title VII addresses discrimination. Plaintiff contends that her employer's failure to implement its own affirmative action plan, designed for the benefit of women and minorities, translates into a Title VII cause of action by which she is entitled to relief. We hold, however, that absent a showing of discrimination, there is no Title VII cause of action for the failure to implement or utilize an affirmative action program. Without repeating here the analysis there made, we simply adopt as the law of this Circuit the reasoning and conclusion of the Fourth Circuit in Page v. Bolger, 645 F.2d 227 (4th Cir.), (en banc), cert. denied, 454

U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981):

> [It is argued that] a proven violation of the Postal Service's statutorily mandated 'affirmative program,' designed to eradicate discrimination, would be made a violation of Title VII itself. Affirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions. We do not think this could accord with Congressional intent.

645 F.2d at 233-34 (citations omitted).

To prevail under Title VII plaintiff would have to show discrimination by her employer. Discrimination under Title VII may be based upon disparate treatment of an individual employee compared to other employees, or disparate impact of employment practices upon protected groups of employees, or both. Eastland v. Tennessee Valley Authority, 704 F.2d 613, 618 (11th

Cir. 1983). Although the district court opinion addressed plaintiff's disparate treatment claims, plaintiff, on appeal, focuses primarily upon the question of disparate impact. The difficulty with plaintiff's case is that the record simply reveals no evidence to establish even a prima facie case under either theory.

Plaintiff alleges that before her employment with Tuscaloosa Veterans Administration Medical Center she worked as a librarian at the Federal Center for Disease Control in Atlanta, Georgia. According to plaintiff, the Medical Center knew of her interest in the job of Librarian at the time she was hired as a Medical Records Technician in November of 1974. She allegedly apprised her supervisors and the appropriate personnel officials of her continuing interest in the position of Librarian on several occasions. Plaintiff asserts that none of those individuals

ever advised or counseled with her regarding her continued qualification for the position. When the vacancy was announced in October of 1980, she was informed for the first time that she did not possess the requisite educational qualifications for the job. The position was ultimately filled by another female who did possess the requisite qualifications. Plaintiff posits her cause of action on the failure to advise and train her so that she would have had the necessary qualifications for the job. She failed to show, however, any discrimination by the employer.

The undisputed evidence shows that plaintiff did not meet the specified educational qualifications for the position of Librarian. To establish a prima facie case under a disparate treatment theory, plaintiff would have to show she was qualified for the position she sought. McDonnell Douglas Corp. v. Green, 411 U.S.

792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (one element of a four-factor test by which a plaintiff may establish a prima facie case of discrimination under a disparate treatment theory).

Plaintiff has likewise failed to prove her case under a disparate impact theory. She introduced no evidence indicating that any of the requirements for the position were discriminatory, and she offered no evidence indicating that the selection process for the position of Librarian impacted adversely upon women, or that the affirmative action program was executed in a discriminatory manner. See Eastland at 619 (prima facie case under disparate impact theory requires proof that a facially neutral employment practice has a discriminatory impact upon a protected group). The fact that it was a female who did meet the requisite qualifications, and who was ultimately hired for

the job, militates against an assertion of sex-based discrimination on the part of the defendant.

In sum, to the extent plaintiff's claim is based on the failure of her employer to follow an affirmative action plan in not training her for the job, she loses as a matter of law, absent a showing of a discriminatory implementation of that plan. To the extent that her Title VII claim is based on discriminatory treatment or impact, she loses as a matter of fact because there is no evidence to support such a claim. We note that no claim is made upon which to premise a breach of contract action, such as an assertion that the affirmative action plan was part of plaintiff's employment contract. A case where the facts would support such claim would, of course, not be controlled by this decision as to a Title VII claim.

The district court correctly analyzed this case in entering summary judgment for defendant.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Western Division

FILED
Nov 12 1982
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

BETTE RUTH S. FERGUSON,	)	/s/ slm
PLAINTIFF,	)	
-vs.-	)	NO. CV 81-P-1785-W
ROBERT P. NIMMO, Administrator of Veterans Affairs, Veterans Administration; United States of America,	)	
DEFENDANTS.	)	

O R D E R

In accordance with the accompanying Memorandum of Opinion, the defendant's motion for summary judgment is GRANTED, and this cause is DISMISSED. Costs are taxed against the plaintiff.

The plaintiff's motion for summary judgment is hereby DENIED.

This the 10th day of November, 1982.

/s/ Sam C. Pointer,Jr.
United States District
Judge

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/ Susan Manning
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Western Division

FILED
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

BETTE RUTH S. FERGUSON,	)	/s/ slm
PLAINTIFF,	)	
-vs.-	)	NO. CV 81-P-1785-W
ROBERT P. NIMMO, Administrator of Veterans Affairs, Veterans Administration; United States of America,	)	
DEFENDANTS.	)	

MEMORANDUM OF OPINION

Plaintiff brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)(3), 2000e-16(c), and the Age Discrimination in Employment Act, 29 U.S.C. § 633a(c), alleging unlawful employment practices by her employer, the Veterans Administration Medical Center at Tuscaloosa, Alabama.

This cause is now before the court on defendant's motion for summary judgment and plaintiff's cross motion for summary judgment. Based on the undisputed facts cited below, the court concludes that defendant is entitled to judgment as a matter of law.

Plaintiff, Bette Ruth S. Ferguson, a white female who was 51 years of age at the time of the filing of this lawsuit, is an employee of the Veterans Administration Medical Center at Tuscaloosa, and has been continuously employed there as a medical records technician (GS-6) since November 1974. Prior to 1974 she had held a permanent federal position as a medical librarian at the Center for Disease Control in Atlanta, Georgia. When making application for the Tuscaloosa position, she was informed that there was no need for a librarian there at that time, but that there was an opening for a medical records tech-

nician (GS-6). She accepted the GS-6 opening and remained in that position at the time of the filing of this lawsuit.

In September and October 1980 defendant announced an opening for the position of Librarian (Biological and Medical Sciences) (GS-9) at the Tuscaloosa Center. Plaintiff applied for the position but was notified that she did not possess the requisite educational qualifications to apply for Librarian (BMS). Another applicant, Ms. Betsy S. Pertzog, who is eleven months older than plaintiff, was hired from another Veterans Administration facility to serve as librarian at the Tuscaloosa Medical Center. The agreed and stipulated facts in this case indicate that Ms. Pertzog met the educational criteria for the librarian position and was in fact more qualified than plaintiff.

Plaintiff instituted this suit basing her claims on defendant's failure to im-

plement an affirmative action program at the Medical Center in Tuscaloosa as provided in 42 U.S.C. § 2000e-16(b)(1), Executive Order No. 11478, 29 C.F.R. §1613, and the Veterans Administration Manual, Part I, Chapter 713. The defendant's agents, servants and employees are also charged with failure to follow the VA's affirmative action rules and regulations. Plaintiff asserts that such failure resulted in the denial of the librarian's position to her. Assertions of discrimination by defendant based on age and sex are also set forth in the complaint.

The basic issue in this case is whether a prima facie case of discrimination under Title VII may be demonstrated by showing that a federal agency did not implement or adhere to its affirmative action program. Title VII provides that the Equal Employment Opportunity Commission shall

> (1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment . . . .

42 U.S.C. § 2000e-16(b)(1) (1976). Plaintiff seeks to base her claim herein on the failure of the Veterans Administration to utilize an affirmative action plan as prescribed in the statute so that employees might enhance their skills to perform at their highest potential and advance in accordance with their abilities.

It is well established that the complainant in a Title VII action bears the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Supreme Court indicated that

a prima facie case of discrimination could be established by proving four elements:

> "(i) that [complainant] belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Id., 411 U.S. at 802. While subsequent decisions have recognized that proof of these elements is not the exclusive means for establishing a prima facie case, it remains critical to a claim under Title VII or the ADEA to establish some form of discrimination or contractual rights stemming from a resolution of such claims. Here plaintiff has not shown that she has in fact been discriminated against. The undisputed facts show that plaintiff did not meet the specified educational requirements for the librarian job. Fur-

thermore, the applicant who was hired for the position not only met the educational criteria but was also a female and older than the plaintiff.

The claim that a violation of a federal agency's affirmative action program is a Title VII or ADEA violation was addressed in a recent case, Page v. Bolger, 645 F.2d 227 (4th Cir. 1981). In Page the plaintiff asserted a cause of action based on the failure of the United States Postal Service to follow a section of the Personnel Handbook which provided for appointment of minority members to a review committee. Admitting that the Handbook might be considered a part of the Postal Service regulations having the force of law, the court nevertheless noted that a violation of the regulations could not be redressed as if it constituted a direct violation of the substantive provisions of Title VII.

Id., 645 F.2d at 232, n.10. The court later stated:

> "[It is argued that] a proven violation of the Postal Service's statutorily mandated "affirmative program," 29 C.F.R. § 1613.203, designed to eradicate discrimination, 29 C.F.R. §1613.203(b), would be made a violation of Title VII itself. Affirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions. We do not think this could accord with Congressional intent."

Id., 645 F.2d at 233-34. As the Page court recognized, there is no cause of action under Title VII merely for the failure to implement or utilize an affirmative action program.

Plaintiff's reliance on Jones v. Cleland, 466 F.Supp. 34 (N.D. Ala. 1978), aff'd, 619 F.2d 82 (5th Cir. 1982), is misplaced. In Jones, the plaintiff established a prima facie case of discrimination by defendant. The violation of the

affirmative program complained of in that case was the failure of the VA to assist plaintiff in preparing her application for promotion and to sufficiently elicit qualifications so that she would be properly considered for the job. The distinguishing factor herein is that plaintiff did not meet qualifications for the position sought. Plaintiff therefore has not stated a claim for which relief may be granted by this court. Summary judgment should therefore be granted in favor of defendant and against plaintiff. A separate order shall be entered accordingly.

This the 10th day of November, 1982.

/s/ Sam C. Pointer,Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY:/s/ Susan Manning
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

March 19, 1984

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 82-7389 Bette Ruth S. Ferguson
vs. Veterans Administration

The following action has been taken in the above case:

___ AN EXTENSION OF TIME HAS BEEN GRANTED TO AND INCLUDING

___ for filing appellant's/petitioner's brief.

___ for filing appellee's/respondent's brief.

___ for filing reply brief.

___ for filing petition for rehearing.

___ It is specifically understood and agreed by the movant for extension, that the document above will be filed on or before this new date, and further agreed that no additional extensions will be requested by the movant.

___ Motion to consolidate granted.

___ Motion to supplement or correct the record granted.

___ Motion for leave to file supplemental brief granted.

___ Mction for leave to file brief amicus curiae is granted.

___ Joint motion as to time for filing briefs is granted.

xxx Order enclosed has been entered.

SPENCER D. MERCER,
CLERK

BY: s/s Judy X. Tinoley
Deputy Clerk

cc: Mr. Alvin T. Prestwood
Mr. Frank S. James, III
Mr. Frank W. Donaldson

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-7389

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 19 1984
Spencer D. Mercer
Clerk

BETTE RUTH S.
FERGUSON,

Plaintiff-Appellant,

versus

VETERANS ADMINISTRATION,

Defendant-Appellee.

- - - - - - - - - - - - - - -

Appeal from the United States District
Court for the
Northern District of Alabama

- - - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion January 27, 1984, 11 Cir.,
198_, _____F.2d_____).

Before, GODBOLD, Chief Judge, RONEY and SMITH*, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s1 Paul H. Roney
United States Circuit Judge

*Hon. Edward S. Smith, U. S. Circuit Judge for the Federal Circuit, sitting by designation.

§ 2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code [5 USCS §102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS §104] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive ser-

vice, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and

regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible

for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, section, Executive Order 11478 or any suc-

ceeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. § 2000e-5(f) through (k):

(f) Civil action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall

take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or

political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the

payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a

case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.].

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USCS §§ 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might

have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any

other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(h) Certain provisions inapplicable to actions against unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115) [29 USCS §§ 101 et seq.], shall not apply with respect to civil actions brought under this section.

(i) Proceedings to compel compliance with orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings

brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code [28 USCS §§ 1291, 1292].

(k) Attorney's fee. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

5 C.F.R. §713.202 (1978) (Transferred to 29 C.F.R., Part 1613 by E.E.O.C. on January 1, 1979):

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity to employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

5 C.F.R. §713.203 (1978) (Transferred to 29 C.F.R., Part 1613 by E.E.O.C. on January 1, 1979):

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated

in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) [OMITTED]

(f) [OMITTED]

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h-l) [OMITTED].

EXECUTIVE ORDER NO. 11478, 34 FED. REG. 12985, AS AMENDED BY EXECUTIVE ORDER NO. 11590, 36 FED. REG. 7831; EXECUTIVE ORDER NO. 12106, 44 FED. REG. 1053, REPRINTED in U.S.C.S., NOTE TO 42 U.S.C.S. §2000(e) (SUPP. 1980).

Sec. 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible,

to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit

discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

Sec. 6. This order applies (1) to military departments as defined in section 102 of title 5, United States Code and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code and to the employees thereof (including employees paid from nonappropriated

funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

Sec. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.

VETERANS ADMINISTRATION MANUAL MP-5, PART 1, CHAPTER 713:

1. SCOPE

The purpose of this section is to establish responsibilities and program requirements for implementing equal employment opportunity throughout the VA. [It] applies to all organizations and employees of the VA whether or not in the competitive service, including employees paid from nonappropriated funds, but excepting noncitizens employed outside the United States.

2. POLICY

It is the policy of the VA to provide equal opportunity in employment for all qualified persons; to prohibit discrimination in employment because of race, color, religion, sex, national origin [or age] to promote a positive, continuing program designed to achieve full realization of equal employment opportunity; and to provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, national origin, [or age].

The Federal Women's Program and the [Spanish-Speaking] Program will be considered integral parts of the total VA EQual Em-

ployment Opportunity Program. Special attention will be given in overall program planning to the unique problems of women and the Spanish surnamed as they affect [recruitment, training, and promotion] to ensure that an equal opportunity is accorded these groups.

3. [OMITTED]

4a-4g. [OMITTED]

4h. Supervisors. Supervisors are responsible for:

(1) Analyzing employment patterns and conditions in their organizational units and identifying any problem areas, either real or potential, which act as barriers to equal employment opportunity for all and taking appropriate measures for their elimination.

(2) Evaluating all appointment, assignment, promotion [upward mobility], and training practices within their operations to assure that selections are based on merit and fitness [of] the individual regardless of race, color, religion, sex, national origin, [or age].

(3) Aggressively seeking out qualified employees who they believe have potential for development and following through with actions to provide equal opportunity for training, reas-

signment or other means for improved employee utilization.

(4) Assuring that the lines of communication are open to all employees under their supervision on an equal basis.

(5) Supporting employees under their supervision who are appointed part-time EEO Counselors, adjusting work schedules and workloads as necessary, and otherwise making every reasonable accomodation to insure that counselors are free to carry out their responsibilities as outlined in section B, paragraph 3, this chapter.

i. Employees: Employees at all levels are expected to support the overall Equal Employment Opportunity Program, and, as may be appropriate in the performance of their official duties, to assure that there is equal respect, equal treatment, and equal service for all persons, regardless of race, color, religion, sex, national origin, [or age. They are expected to cooperate with EEO Counselors, Investigators and Complaints Examiners by providing, upon request, information to the extent of their knowledge, in connection with counselings, investigations, and hearings of discrimination complaints].

5. [OMITTED]

6. AFFIRMATIVE PROGRAM REQUIREMENTS

a. The written agency "National Plan of Action" covers equal employment in its broadest aspects. This plan includes overall agency objectives and actions to be taken at the Central Office level to provide appropriate direction; guidance and assistance for the achievement of reasonable and measurable progress. The National Plan provides the direction and framework for the development of specific "Plans of Action" at each VA installation.

b. Each Director [and Central Office Personnel Service for Central Office components] will develop and implement a written plan of action tailored to meet local needs and conditions. NOTE: National Cemetary Supervising Officers shall be responsible for formulating a "Regional" plan of action covering those cemeteries within their regions. Local plans for individual cemeteries are not required unless specified by the Director, National Cemetery System or the National Cemetery Supervising Officer. Installations will be guided in the preparation of their plans by the current VA National Plan of Action and, subject to special instructions set forth in paragraph 9 below, by the format prescribed in FPM Ltr. No. 713-

22. October 4, 1973. In developing and implementing the plan, attention will be given to any or all of the following considerations which are appropriate and applicable to the local situation.

(1) Examining the current status of employment of minority persons and women at all levels, organization by organization (both numbers of employees and distribution by occupational category), using available employment statistics not as an end but as a means of identifying factors which may impede equal employment opportunities.

(2) Establishing clearly that the principles of equal opportunity have complete and unequivocal management support. Staff meetings, station newspapers, bulletin boards, and other locally available resources will be used to communicate policy and program information. Such techniques as publicizing the accomplishments and contributions of minority group and women employees in local news media may also be helpful in getting community understanding and acceptances of the Equal Employment Opportunity Program.

(3) Insuring that appropriate attention is given to the unique circumstances, as they affect employment of women and each of the minority groups rep-

resented in the work force and in the community.

(4) Reviewing and expanding recruitment efforts to include sources of qualified minority group persons and women.

(5) Participating at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to advance equal employment opportunities and to improve community conditions that affect the employability of minority groups and women at all levels.

(6) Making maximum use of the special youth employment programs, the economic opportunity work experience and training programs established under the Economic Opportunity Act, and related programs.

(7) Evaluating and improving utilization of employees. This will necessitate a periodic survey of employees to identify underutilized and nonutilized skills and abilities. Working conditions, training, resources and work assignments also should be reviewed to assure that equal opportunity exists for the development and advancement of all employees to the levels and kinds of work for which they are best qualified.

(8) Reviewing all organizational units and occupations to identify positions susceptible to job redesign as needed to open new or better opportunities for initial appointment or advancement of minority group members and women.

(9) Utilizing Spanish-speaking and other minority persons in public contact positions in communities where a substantial percentage of the public served are members of such groups.

(10) Providing for evaluation and control of personnel actions on a continuing basis with particular attention to such considerations as: (a) reasons given by supervisors when rejecting apparently well-qualified persons for employment, promotion, etc., and (b) eligibles certified for consideration but who are continually passed over.

11) Assuring appropriate participation of minority group members and women in planning, policymaking, and related management and personnel activities. For example, membership on committees of various types should be reviewed to assure proper representation.

(12) Insuring the coverage of equal employment opportunity in [the orientation of new em-

ployees and in] formal supervisory and management training course, and evaluating the timeliness and effectiveness of such training.

[c. Where plans of action involve changes in personnel policies, practices, or working conditions, stations have the responsibility to consult, or negotiate as appropriate, with recognized labor organizations.]

[d.] Stations should take affirmative action to insure that employees are aware that the plan of action is available for review. In addition, since the plan is a public document, it should be made available, upon request, to interested individuals or organizations.

[e. While specific action items related to age are not required to be included in the plans of action, Equal Employment Opportunity Officers must take affirmative action to ensure that all supervisors are made aware of their responsibilities to carry out the VA policy that all agency personnel actions shall be free of discrimination because of age. VA-wide and local personnel practices shall be reviewed periodically to identify and eliminate any practices which might be in conflict with the policy of nondiscrimination because of age.]

7-10. [OMITTED]

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No. 83-2073

In the Supreme Court of the United States

OCTOBER TERM, 1984

BETTY RUTH S. FERGUSON, PETITIONER

v.

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the failure of the Veterans Administration to train and select her for a librarian's position for which she concededly was not qualified constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

1. Petitioner was a GS-6 medical records technician at the Tuscaloosa, Alabama, Veterans Administration Medical Center. In October 1980, she applied for a GS-9 level position as a librarian for medical and biological sciences at the Center. She subsequently was informed that she did not have the requisite educational qualifications for the job. Pet. App. A4-A5, A12-A13. Ultimately, the Center hired another woman who did have the requisite qualifications. Pet. App. A5, A13.

Petitioner then brought this action against the Administrator of Veterans Affairs in the United States District Court for the Northern District of Alabama, contending that she was rejected for the position because the Center had failed to implement an affirmative action plan as mandated by 42 U.S.C. 2000e-16(b)(1); Exec. Order No. 11,478, 3 C.F.R. 133 (1969 comp.); 29 C.F.R. Pt. 1613; and the VA Manual MP-5 Pt. I, ch. 713 (Aug. 12, 1974). This alleged failure to implement such a program, she maintained, was itself a violation of Title VII. Pet. App. A14-A15.

The district court granted summary judgment in favor of the Administrator (Pet. App. A11-A19), and the court of appeals affirmed (Pet. App. A1-A8). The court of appeals concluded that petitioner had failed to establish a prima facie case of discrimination under a disparate treatment theory in connection with the Center's failure to promote her to the GS-9 librarian position, because that theory requires, inter alia, a showing that the rejected applicant was qualified for the position. Pet. App. A5-A6. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The court of appeals also held that petitioner had failed to prove discrimination under a disparate impact theory, because she offered no evidence that the selection process or the administration of the affirmative action program had a disproportionately adverse effect on women. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In particular, the court reasoned, the selection of another woman for the job in question suggested that this was not the case. Pet. App. A6-A7.

The court of appeals further explained that absent a showing of discrimination, there is no cause of action under Title VII based simply on the failure of a federal agency to implement or utilize an affirmative action program. Pet. App. A2. In so holding, the court adopted both the reasoning and the conclusion of the en banc decision in *Page* v.

Bolger, 645 F.2d 227 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981). Quoting the Fourth Circuit's decision in *Page* v. *Bolger, supra,* the court of appeals reasoned that if the result were otherwise, "[a]ffirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions" (Pet. App. A3, quoting 645 F.2d at 233-234).

2. Petitioner concedes (Pet. 8, 12) that she lacked the educational prerequisites for the librarian's position at the time the vacancy in question was filled and that it was necessary for her to resume her formal education in order to attain them. She nonetheless argues (Pet. 9-21) that the courts below erred in holding that she had not established a violation of Title VII. This contention is without merit.

a. It is clear that petitioner has not established a prima facie case of disparate treatment under Title VII, because she concededly has not satisfied one of the essential elements of her case: a showing that she possessed the necessary qualifications. See, *e.g., McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Commuuity Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Petitioner does not claim that the Center was under a court order to remedy any proven past discrimination through affirmative action or that the Center was somehow obliged to provide her with the course credits she had not secured on her own. Rather, she says her lack of qualifications was "irrelevant" (Pet. 12) because the Veterans Administration had not "appropriately emphasize[d]" those qualifications to her over the years preceding the October 1980 vacancy.[1]

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[1]However, although the courts below did not consider it necessary to rule on the implementation of affirmative action at the Center, the Veterans Administration offered affidavits to support its summary judgment motion showing, inter alia, that the Center had a policy of

Even if we assume, however, that the Veterans Administration had a responsibility under accepted personnel practices to prepare her educationally for the librarian's position and that it did not properly apprise her of the requirements for that job, petitioner still has not established a Title VII violation. See *Page* v. *Bolger*, 645 F.2d at 233-234; cf. *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974) (failure to train not a Title VII violation). Title VII itself does not mandate that these or any other terms or conditions of employment be afforded to an employee. Insofar as the federal sector is concerned, Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Thus, only if the failure to provide training or information or some other term or condition of employment to petitioner had been the result of "discrimination based on * * * sex" would a Title VII violation be establilshed. Cf. *Hishon* v. *King & Spaulding*, No. 82-940 (May 22, 1984), slip op. 4-7. Petitioner, however, has not shown that training or information was withheld from her because she is a woman, or pursuant to a practice which discriminates against women.

b. Petitioner's claim (Pet. 13-16) with respect to disparate impact — *i.e.*, that, because the Veterans Administration allegedly continues to allow [] employees to fend

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providing career information and counseling to all employees; that posted notices and Merit Promotion Plan handouts advised employees to seek career counseling; and that in August 1978, petitioner attended a workshop sponsored by the Center at which participants were instructed how to apply for positions and how to ascertain educational and experiential requirements for jobs in which they were interested (R. 1029). A separate affidavit from one of petitioner's supervisors indicated that she had informed petitioner of a vacancy in 1977 but that petitioner said she would not pursue it because she did not wish to return to school in order to fulfill the requirements of the job (R. 1032).

for themselves in seeking promotional opportunities" (Pet. 15), it has violated title VII —is similarly untenable. Petitioner has not pointed to any specific employment practice that has disadvantaged women as a group. To the contrary, as the court of appeals noted (Pet. App. A6), petitioner introduced no evidence that any of the requirements for the librarian position were discriminatory, that the selection process for the job had an adverse impact on women, or that the affirmative action program was discriminatorily administered.

c. Finally, petitioner is clearly wrong in suggesting (Pet. 17-22) that an alleged failure by an agency to comply with a particular aspect of its affirmative action plan in itself gives rise to a cause of action under Title VII, even in the absence of a showing of discrimination based on a prohibited ground. She cites no authority for that proposition, and in fact it is refuted by an examination of the text of Title VII. The Section of Title VII authorizing the bringing of a civil action by a federal employee (42 U.S.C. 2000e-16(c)) permits such a suit to challenge a discriminatory personnel action taken in violation of 42 U.S.C. 2000e-16(a). The requirement that an agency devise an affirmative action plan does not appear in Subsection (a) of 42 U.S.C. 2000e-16; it is contained in Subsection (b), which concerns the general administrative responsibilities of the employing agency and the EEOC, not the private rights of employees and applicants.

Moreover, as the Fourth Circuit observed in *Page* v. *Bolger, supra*, in creating enforceable private rights under Title VII, Congress focused on "ultimate employment decisions" rather than on some "mediate" action, such as implementation of an affirmative action program. 645 F.2d at 233-234. Congress doubtless anticipated that there would be experimentation and variation among federal agencies in the formulation of their affirmative action plans. As the

court below and the Fourth Circuit in *Page* v. *Bolger* both concluded, Congress did not intend for the features of such plans, which may well change from year to year even within a single agency, to define the standards for compliance with Title VII. Such a holding would create uncertainty in the development of Title VII law. It also could serve to chill the efforts of agencies to take appropriate measures actively to promote equal opportunity, because of a fear that any steps that go beyond the minimum requirements of Title VII, as courts have traditionally enforced it, would lead to liability.

This Court declined to grant review of the Fourth Circuit's holding in *Page* v. *Bolger* on this issue, and the same course is appropriate here. Indeed, the plaintiff who challenged the composition of a promotions committee in *Page* v. *Bolger* at least was qualified for the position he sought, although the committee found that others were more so. 645 F.2d at 229. Here, petitioner cannot even make that claim. Since there is no conflict among the courts of appeals on this issue, review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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